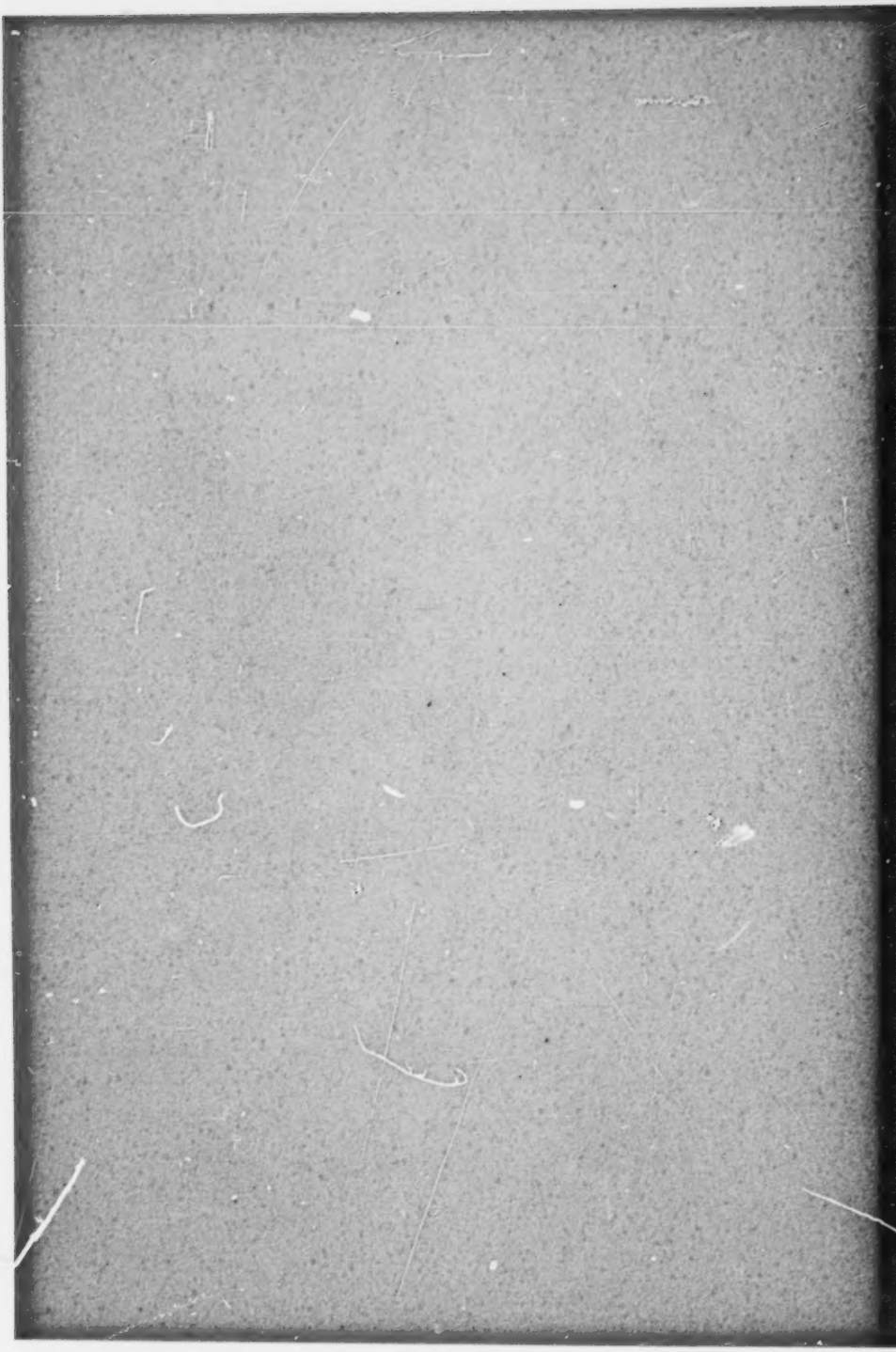

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1377

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*

vs.

THE CITY OF NEW YORK on Behalf of Itself and All Other Similarly Situated Municipalities Within the State of New York, et al.

No. 73-1378

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, *Petitioner*

vs.

CAMPAIGN CLEAN WATER, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUITS

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF MINNESOTA

QUESTIONS PRESENTED

1. May the Administrator of the U.S. Environmental Protection Agency ignore Congressional intent and the mandatory requirements of the Federal Water Pollution Control Act Amendments of 1972 by refusing to allot to the States the full sums authorized by Congress to be appropriated for the construction of publicly owned sewage treatment works?

2. If the Administrator had any discretion in controlling the rate of spending for construction of publicly owned sewage treatment works was it erroneously exercised in that (a) it was exercised at the allotment stage rather than obligation stage; (b) the decision was based upon evaluation of competing national policies, priorities, goals, and objectives other than those established by Congress; (c) the amount withheld effectively frustrated achievement of the goals and purposes of the Act, and (d) in impounding the funds the Administrator sought to do indirectly what Congress directly forbade him to do by overriding the Presidential veto of the Act?

3. Is the allotment of funds within the narrow exception of being so "committed to agency discretion" that it is beyond judicial review even though the Act provides adequate standards by which the discretion may be evaluated to determine whether it was erroneously exercised?

STATEMENT OF THE CASE

The cases before the Court present issues of statutory construction to determine the existence of discretion, or the extent of any such discretion, granted to the Administrator of the United States Environmental Protection Agency (hereinafter the Administrator) in allotting funds among the States pursuant to the Federal Water Pollution Control Act Amendments of 1972 (hereinafter the Act).[1]

The pervasive objective of the Act as stated in Section 101(a) "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Congress declared in Section 101(a)(4) of the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned treatment works; . . . ." This policy is a vital part of the Act and is essential to achieve its objective. Congress authorized to be appropriated amounts not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974 and $7 billion for fiscal 1975 to carry out this policy. Section 207.

The President vetoed the Act on October 17, 1972. The President in his message to Congress stated:

> Even if this bill is rammed into law over the better judgment of the Executive—even if the Congress defaults its obligation to the taxpayers—I shall not default mine. Certain provisions of S. 2770 confer a measure of spending discretion and flexibility upon the President, and if forced to administer this legis-

[1] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, 33 U.S.C. 1251, et seq. The Act is commonly referred to by section rather than by its Code Citation. Therefore all references to the Act hereinafter will be by section number of the Act as enacted, Pub. L. 92-500.

> lation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.

118 Cong. Rec. S. 18534-35 (Daily ed., October 17, 1972).

Congress considered the veto message and overwhelmingly overrode the veto. In the House, the vote was 247 to 23; in the Senate, it was 52 to 12. The President's intention was later carried out by his directive to the Administrator to allot to the States $2 billion instead of the $5 billion authorized for fiscal 1973, $3 billion instead of the $6 billion authorized for fiscal 1974 and, although not an issue herein, $4 billion instead of the $7 billion authorized for fiscal 1975.

Respondent City of New York has obtained from the Court below an order which compels the Administrator to allot among the States the full amounts authorized by Congress. Respondent Campaign Clean Water has obtained an order for a *de novo* review of the Administrator's decision to determine if he abused his discretion. Petitioner seeks review of both cases, which have been consolidated in this Court.

INTEREST OF AMICUS CURIAE

The Court's decision in these cases will substantially affect the State of Minnesota by setting a precedent which will be decisive in its case against the Administrator in the United States Court of Appeals for the Eighth Circuit. Minnesota obtained from the United States District Court for the District of Minnesota, Fourth District, an order to compel the Administrator to allot to Minnesota the full sums Congress authorized to be appropriated for the construction of publicly owned

treatment works as provided in Sections 205 and 207 of the Act.[2]

The Administrator appealed the order to the Court of Appeals for the Eighth Circuit. Written briefs and oral argument have been presented to the Court of Appeals. The case is presently pending for decision. Minnesota's case involves virtually identical issues to those involved in the cases presently before the Court.

The Administrator's action resulted in a drastically reduced allotment to the State of Minnesota. For fiscal years 1973 and 1974 Minnesota received a total of $101.5 million instead of the $222.5 million authorized, or a total reduction of $121 million. The direct effect on Minnesota is that numerous sewage treatment works in the State will not be constructed or upgraded. Consequently, the cutback on the allotments to Minnesota guarantees that its municipalities and sanitary districts will fail to meet the requirements and goals of the Act.

There is an adverse environmental effect from the Administrator's refusal to allot because inadequately treated sewage and industrial wastes will continue to be discharged into Minnesota waters. The stoppage of construction of treatment works for fiscal 1973 is estimated to result in a flow of 285 million gallons per day of inadequately treated sewage. The pollution and health effects from untreated sewage are well established.

The State of Minnesota has great interest in achieving and maintaining high water quality necessary for the propagation

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[2] *State of Minnesota v. Fri*, No. 4-73, Civ. 133 (D. Minn., June 25, 1973). The opinion and order of Federal District Court Judge Miles W. Lord has not been reported. The factual references made herein by the State of Minnesota are based on affidavits that are part of the record in Minnesota's case. The affidavits were not disputed by the Administrator.

of fish and wildlife and recreation in and on its waters. The recreational benefits accruing to the State from fish and game are estimated to be valued at approximately $200 million per year. Pollution from untreated sewage primarily causes oxygen depletion and artificial enrichment of lakes and rivers which adversely affect the propagation of fish and recreational uses. Construction of secondary treatment facilities reduces or eliminates these detrimental effects.

Minnesota urges that the result in this case should be to require the Administrator to allot the Congressionally authorized funds now withheld from the States.

SUMMARY OF ARGUMENT

1. Under the Act the Administrator has no discretion to determine the amounts to allot among the States. The Act contains mandatory language that the $5 billion and $6 billion for fiscal years 1973 and 1974, respectively, "*shall be allotted by the Administrator.*" Congress intended the full sums authorized to be appropriated to be allotted among the States. This intent is manifested in the Act as a whole and its legislative history.

2. If the Administrator has been granted *any* discretion by the Act he exercised it erroneously. First, any discretion rests at the *obligation* stage instead of the *allotment stage.* Second, even if there existed discretion at the allotment stage it was flagrantly abused by the Administrator. His discretion is circumscribed by the bounds of the Act and may not be exercised for reasons remote and unrelated to the Act. Third, the refusal to allot 55% of Congressionally authorized funds was an abuse of discretion because it was in derogation of the policy and goals established by Congress in the Act. The im-

poundment of the authorized funds was an attempt to undo what Congress accomplished by exercising its Constitutional right to override the Presidential veto of the Act: emphatically mandating that the full $18 million be allotted to the States.

3. The Administrator's action does not fall under the narrow exception of the Administrative Procedure Act making nonreviewable actions totally committed to Agency discretion where the statutory authority is so broad that there is no law to apply. The Act provides definite standards against which the Administrator's action can be reviewed to determine if he has misconstrued his powers and abused his discretion.

ARGUMENT

I. THE ACT AND ITS LEGISLATIVE HISTORY INDICATE THE ADMINISTRATOR HAS NO DISCRETION TO CURTAIL AUTHORIZED FUNDS AT THE ALLOTMENT STAGE.

A. The Act Manifests Clear Congressional Intent to Attain Clean Water.

The Act is a comprehensive and far-reaching law designed to clean up the Nation's waters. The provisions for Federal financial assistance to construct publicly owned treatment works are major features of the Act and a keystone of the statutory objective. It is important that these financial provisions be put in proper context with other provisions of the Act relevant to the statutory scheme to attain clean water.

The Act begins by stating that its objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a). To achieve this ob-

jective, Congress declared as goals of the Act that "the discharge of pollutants into the navigable waters be eliminated by 1985" and that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Section 101(a)(1), (2). Congress unequivocally stated in the Act that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." Section 101(a)(4).

Title II of the Act is entitled "Grants for Construction of Treatment Works." The purpose of this title is "to require and to assist the development and implementation of waste treatment plants and practices which will achieve the goals of this Act." Section 201(a). The Administrator "is authorized to make grants to any State, municipality, or to intermunicipal or interstate agency for the construction of publicly owned treatment works." Section 201(g)(1). Congress "authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000." Section 207.

A state's share of the authorized amounts for fiscal 1973 and 1974 is determined by a statutory formula based on "the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears on the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205. Allotments to the States commencing in fiscal 1975 are to be made in accordance with revised cost estimates submitted to and approved by Congress. Section 205(a).

The designated shares are to be allotted among the States by the Administrator. Those allotted funds then are available for grants to construct publicly owned treatment works within the State. Section 203. An individual applicant for a grant submits plans, specifications, and estimates for each proposed project to the Administrator for his approval. Approval of the plans, specifications, and estimates by the Administrator is deemed to constitute a contractual obligation of the United States for the payment of its proportional contribution to such project. Section 203(a).

Prior to final approval of a treatment works project, the Administrator must consider the "limitations and conditions" of Section 204. For example, the Administrator is to determine that (a) the treatment works is in conformity with any applicable State plan under Section 303(e) of the Act, (b) such works have been certified by the appropriate State water pollution control agency as entitled to priority over such other works in the State, (c) there are adequate provisions satisfactory to the Administrator for assuring proper and efficient operation and maintenance, and (d) the size and capacity of the works relate directly to the needs to be served by the works. Section 204(a)(2), (3), (4) and (5).

The Federal share of the construction costs for approved projects is 75 per centum. Section 202(a). Expenditures of allotted funds are to be made by the Administrator in the form of payments to the recipient of a grant as the work progresses and costs of construction are incurred on the project. Section 203(b).

The successive administrative stages involving Title II grants thus include:

(a) the *authorization* of funds to be appropriated, Section 207,

(b) the *allotment* by the Administrator of these funds among the States, Section 205,

(c) the *submittal* by the grantees of plans, specifications and estimates of treatment works projects to the Administrator for approval, Section 203,

(d) the *review* by the Administrator of the projects pursuant to the limitations and conditions of Section 204,

(e) the approval by the Administrator of the project which thereby *obligates* the Federal government to pay 75 percent of the eligible costs, Section 203, and

(f) the *payment* to the grantees by the Administrator of project progress payments from the allotted funds, Section 203, and the *appropriation* by Congress of the funds necessary to cover the Administrator's expenditures on the project.

The issues before the Court involve the Administrator's action at the *allotment* stage.

Title III of the Act is entitled "Standards and Enforcement." The discharge of any pollutant by any person is unlawful except when in compliance with various sections of the Act. Section 301(a). Persons operating publicly owned treatment works are included and are subject to enforcement actions.

Section 301(b) provides that "[i]n order to carry out the objective of this Act there shall be achieved . . ." for all publicly owned treatment works secondary treatment by July 1, 1977, and the best practicable waste treatment technology by July 1, 1983. States are prohibited from adopting or enforcing an effluent limitation that is less stringent than those established under the Act. Section 510.

Title VI of the Act is entitled "Permits and Licenses." Section 402 establishes the National Pollutant Discharge Elimination System (hereinafter NPDES) which requires permits be obtained for the discharge of pollutants. The discharges from publicly owned treatment works require an application for an NPDES permit. Section 402(k). These permits must "insure compliance with, any applicable requirements of sections 301, 302, 306, 307 and 403; . . . ." Section 402(b)(1)(A). Neither the Administrator nor a State can issue a permit to a publicly owned treatment works under Section 402 which does not insure that requirements of the existing water quality standards are complied with or that effluent limits of secondary treatment are achieved by July 1, 1977.

Any person, which by definition includes a municipality or a sanitary district, Section 502(5), found willfully or negligently violating the effluent limitations of Section 301 is punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation or by imprisonment for not more than one year, or by both. Section 309(c)(1). Any person who merely violates Section 301 effluent limitations is subject to a civil penalty not to exceed $10,000 per day of such violation. Section 309(d).

If the Administrator finds any person in violation of Section 301, he is required to issue an order to obtain compliance or to bring a civil action. Section 309(a)(3). A person who violates an order issued by the Administrator is subject to the civil penalty provision. Section 309(d). Whenever a municipality is a party to a civil action brought by the United States, the State is to be joined as a party. The State is liable to the extent that its law "prevent[s] the municipality from raising revenues needed to comply with such judgment." Section 309(e).

Any citizen adversely affected may commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation under the Act. Section 505(a) and (g). Federal district courts are given jurisdiction over these suits to enforce effluent standards and to apply any appropriate civil penalty under Section 309(d) of the Act. Section 505(a)(2). Any interested person may seek judicial review of any NPDES permit issued or denied under Section 402. Section 509(b)(1)(F).

The statutory scheme includes a broad objective, with declared goals and policies, established deadlines for achievement of effluent standards and limitations, permits for discharge of pollutants, and strong enforcement penalties to assure compliance. The Administrator's refusal to allot 55% of the funds authorized must be viewed from the total perspective of the Act. These features of the Act cannot be isolated from Sections 205 and 207. The Administrator's narrow focus on Sections 205 and 207 distorts the clear thrust of the Act which is to abate water pollution.

B. The Statutory Scheme Imposes a Clear Mandatory Duty Upon the Administrator to Allot.

The requirement to *allot* the full amounts is clear and unambiguous.

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, *shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized*, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972.

(Emphasis added.) Section 205(a).

Contrary to the Administrator's contention, the authorized funds do not remain indefinitely available for allotment. Section 205(b)(1) provides:

> *Any sums allotted* to a State under subsection (a) shall be available for obligation under section 203 on and after *the date* of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of *the fiscal year for which such sums are authorized.* Any amounts *so allotted* which are not obligated by the end of such one-year period *shall be immediately reallotted* by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the *last allotment of sums* under this section. *Such reallotted sums* shall be added to the *last allotments* made to the States. Any sum made available to a State by *reallotment* under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(Emphasis added.)

Only the funds *allotted* by the Administrator remain available for obligation. If the Administrator does not follow the statutory requirements by allotting and immediately reallotting[3] the authorized funds at the time and dates indicated,

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[3] The State of Minnesota in its case obtained an Order dated June 25, 1974, for supplemental injunctive relief compelling reallotment in 1974 of the state's share of unobligated 1973 funds. It was Minnesota's position that if the Administrator did not "immediately reallot" the fiscal 1973 funds which were ordered to be allotted these funds would be irretrievably lost and not available for obligation. The Administrator by the supplemental Order was thereby not allowed to accomplish by reason of a lengthy appeal process what he was unable to accomplish under the Order to allot the full sums authorized for Minnesota.

the unallotted funds lapse and are irretrievably lost to the States. The mandatory language of Section 205 precludes *supplemental allotments*. Numerous courts have arrived at the same conclusion. *City of New York v. Train*, 494 F.2d 1033 (1974); *State of Ohio v. Environmental Protection Agency, et. al.*, C. 73-1061 and C. 74-104 (N.D. Ohio, June 26, 1974); *State of Maine v. Train*, Civ. No. 14-51 (D. Maine, June 21, 1974); *State of Florida v. Train*, Civ. No. 73-156 (N.D. Fla., Feb. 25, 1974); *State of Texas v. Ruckelshaus*, C.A. No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973); *Martin-Trigona v. Ruckelshaus*, No. 72-C-3044 (N.D. Ill., June 29, 1973); and *State of Minnesota v. Fri*, No. 4-73, Civ. 133 (D. Minn., June 25, 1973).

The State of Minnesota does not desire to disparage the declared intentions of the Administrator eventually to commit the full amount of funds authorized by Congress. However, the Administrator has indicated in the Federal Register that "[a]llotments shall be made not later than the January first preceding the beginning of the fiscal year for which authorized, except for the allotment for fiscal year 1973 which is made herein." 38 Fed. Reg. 5331, §35.910-1(d), Feb. 28, 1973. Moreover, the Administrator has not indicated in the Federal Register any intention to allot the full sums authorized by Congress. No regulations have been promulgated regarding the procedure under which these funds are to be "supplementally" allotted to the States. The only way the State of Minnesota and other States can be legally certain that all authorized funds will be made available to them for obligation is by the Administrator's adherence to the statutory allotment requirement of the Act.

C. The Amounts Authorized Were Based on National Needs to Achieve the Act's Purposes.

The designated sums in Section 207 were based on estimates of the needs of the Nation to construct and upgrade sewage treatment works to meet the requirements of the Act. The Congressional Record is replete with evidence supporting the $18 billion figure.

The National League of Cities and the U.S. Conference of Mayors estimated the total construction needs of municipalities at approximately $35 billion between the years 1972 and 1977. 118 Cong. Rec. H. 10267 (Daily ed. Oct. 18, 1972). The U.S. Environmental Protection Agency's *own* cost estimates for constructing waste treatment facilities planned for fiscal years 1972 through 1974 was $14.5 billion. The former Administrator of the Agency, William Ruckelshaus, explained in his letter to the President urging him *not* to veto the Act that the dollar figures were consistent with the needs estimate that his Agency had provided Congress.[4] The Ruckelshaus letter states in pertinent part as follows:

> The total value of construction initiated in the near-term under the enrolled bill is expected to correspond closely to the total value of construction that would have been initiated under the Administration bill. Under the Administration's proposal, communities were free to continue to initiate reimbursable projects, were not constricted by the $6 billion authorization, and could have substantially increased this amount. Reimbursable projects are precluded

[4] See also Senator Muskie's explanation of how the Conferees arrived at the authorized levels. 118 Cong. Rec. S.18548 (Daily ed. Oct. 17, 1972).

under the enrolled bill and the $18 billion contract grant authority represents a ceiling, while the Administration's $6 billion proposal represented a floor. With the projected close correspondence in a total near-term value of construction starts, the potential inflationary impact upon the entire construction sector would be minimized.

The total amount of contract grant authority contained in the enrolled bill is formulated from the Administration's estimate of construction needs as submitted to the Congress in February of this year. The total Federal share of 75% would amount to $13.6 billion. This needs estimate did not include funds for combined storm and collection sewers, or for recycled water supplies. These are project eligibilities newly specified by the enrolled bill.

This needs estimate provided to the Congress was constructed to support the commitment of the President in his State of the Union message of January 22, 1970, to "put modern municipal waste treatment plants in every place in America where they are needed to make our waters clean again, and to do it now." This commitment was repeated in the February 1970, Message on the Environment, which enunciated funding support for "every community that needs it with secondary waste treatment, and also special, additional treatment in areas of special need, including communities of the Great Lakes." The commitment was re-endorsed in the February, 1971, Message on the Environment with a statement that we should provide "adequate funds to ensure construc-

> tion of municipal waste treatment facilities needed to meet water quality standards."

(Emphasis added.) 118 Cong. Rec. S. 18546 (Daily ed. Oct. 17, 1972).

Senator Muskie asked the Senate some crucial questions regarding the high costs of attaining clean water and gave the following answers:

> Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make possible life on this planet? Can we afford life itself? Those questions were never asked as we destroyed the waters of our nation, and they deserve no answers as we finally move to restore and renew them. These questions answer themselves. And those who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75% grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation.

(Emphasis added.) 118 Cong. Rec. S. 16870 (Daily ed. Oct. 4, 1971).

The Court of Appeals for the District of Columbia in its decision in *City of New York v. Train, supra,* extensively reviewed legislative history that preceded adoption of the $18

billion figure and correctly found it to be a clear expression of Congressional will.

> We find that it was Congress' intention that that full $18 billion be spent to control water pollution.

494 F.2d at 1042.

This conclusion should also be reached by this Court. If the full amount is not allotted, as the law requires, the needs and goals of this Nation to clean up its waters will not be met. Subsequent estimates now unfortunately demonstrate that the Congressional estimate itself was short.[5] Congress certainly did not intend that the development of a shortgage would justify a reduction in allotment.

D. The Allotment Scheme Was Established to Aid the States in Planning to Meet Statutory Requirements.

In the developmental stages of the Act amendments were proposed in both houses of Congress to strike the contractual obligation authority which binds the United States to pay its proportional share upon approval of a project by the Administrator. The traditional method of funding has been the opposite: to reimburse the grantee through the annual appropriations process. The experience of Congress with the old method was that it did not work as intended and that the requirements of the Act necessitated a firm commitment that could be relied on by potential grantees for long range planning purposes. Congressman Jim Wright, a member of the House Public Works Committee and later a conferee, in debating the issue on the floor of the House, made the following points which emerged as the prevailing view in the House:

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[5] The Administrator's report to Congress indicates total national needs of $64.5 billion, of which $20.1 is eligible for federal grant participation. "Report to Congress—Costs of Construction of Publicly-Owned Wastewater Treatment Works—1973 'Needs' Survey."

The bill requires that by 1976 every publicly owned plant in the Nation must provide at least secondary treatment, and that by 1981 it must employ as a minimum "the best practicable technology." [6]

The bill promises that the Federal Government will contribute its pro rata share of the cost.

But what good is that requirement, and what good is that promise, if we do not absolutely intend to deliver upon our part of the bargain?

Why should advance obligational authority be necessary? The events of the last few years suggest the answer.

The authorization for fiscal 1969 was $700 million, but the appropriation was only $214 million—less than one-third—and the amount actually spent was only $134 million.

For the 4 years, 1968 through 1971, the shortfall of appropriations below the amounts held out in the authorization bill totaled approximately $1.2 billion. And because of periodic administrative freezes on construction grants, the shortfall in the amounts actually granted came to approximately $1.6 billion.

. . . .

Mr. Chairman, many municipalities, faced with truly critical water pollution problems and intent on solving those problems in a timely fashion notwithstanding the failure of the Federal Government to live up to its part of the bargain, went ahead on their own and built the plants.

Obviously it would not be our intention to penalize those communities for having demonstrated the

[6] The dates were changed in the final version of the Act to 1977 and 1983 respectively.

initiative and determination to move ahead. And so this bill authorized more than $2 billion to reimburse them for that portion of the authorized Federal share that was withheld from them.

But other communities waited, because they were unsure of the strength of the congressional commitment. And because they waited, the cost both to them and to the Federal Government is considerably greater today than it would have been had they been encouraged to proceed 4 years ago.

So this is the acid test. *We decide right now just how serious we are about cleaning up the streams of this country.* Do we mean it, or do we not? Are we certain, or are we uncertain?

I for one am certain. I believe that most of the Members are. I am ready to make that commitment. I think the Public Works Committee is certain, and the majority of the House is certain. *We can prove it by voting down this amendment and saying to the communities of this Nation that once they put their hands to the plow, they need not turn back.*

(Emphasis added.) 118 Cong. Rec. H. 2726 (Daily ed. Mar. 29, 1972).

Congressman Harsha emphasized the need for advance planning and assured availability of funds.

Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.

> Now, *this can only be accomplished if there is assured availability of Federal grant funds for future years.* This necessary assurance is not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.
>
> The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engineering for the preparation of plans, specifications, and estimates; the acquisition of land where appropriate, and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separate project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.
>
> At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no assurance that appropriated funds would be available for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepared. This, therefore, makes the orderly continuous planning and scheduling of work impossible.

(Emphasis added.) 118 Cong. Rec. H. 2727, H. 2728 (Daily ed. March 29, 1972).

Senator Muskie presented similar prevailing arguments in the Senate.

Mr. President, in this bill we have undertaken to do something that we have never done before on a problem with such long-range impact as this. We have set deadlines that must be met by industry, and presumably by all polluters, including governmental polluters. We have set a deadline in 1976 and we have set a deadline in 1981; and finally we set the goal of no discharges of pollutants into any waterways by 1985.[7]

There is only one way to meet deadlines like that, and that is to make a total commitment now. If we indicate in any way any reservations about our commitment as a government and as a Congress to the achievement of those goals in the point of view of the public sector, what we have done is undermine the credibility of our determination to insist on that goal and its achievement by the private sector.

To achieve the deadlines we are talking about in this bill—I think all of us in the committee are proud of it, and we are committed to it—*we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load.* We cannot budge, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. The municipalities, through the Conference of Mayors, have estimated at the request of the committee that the initial investment required is $30 to $35 billion. The authorization we have provided in this bill of $14 billion[8] for 4 years

[7] The dates were changed in the final version of the Act to 1977, 1983, and 1985 respectively.

[8] This was changed to $18 billion in the final version of the Act.

> to meet the Federal share is a hard, conservative figure. All we are saying in asking the Senate to approve contract authority is a commitment now to that $14 billion. If we have any hesitation about that commitment, then we will eliminate the contract authority and keep our options open.

(Emphasis added.) 117 Cong. Rec. S. 17445 (Daily ed. Nov. 2, 1971).

As noted by the District Court in *City of New York v. Ruckelshaus, supra,* 674 F. Supp. at 674:

> The seriousness of the planning problem was understood by Congress. It was one of the reasons for utilizing the device of allotment, thereby making funds available for obligation [by contract authority], in lieu of the ordinary appropriations procedure.

It strains credulity to assume that Congress established the allotment and contract authority funding mechanism to correct the vagaries of the annual appropriation process, and coincidently granted the Administrator discretion to undercut its commitment by reintroducing the uncertainties of the old system back into the process. The firm commitment of Congress vanishes with any exercise of discretion by the Administrator *at the allotment stage.* If the funding provisions are to have any meaning at all, it can only be concluded that Congress did not intend the sums authorized for allotment to be altered at the whim of the Administrator.

II. THE ADMINISTRATOR HAS NO DISCRETION TO REDUCE ALLOTMENTS.

A. The Act Requires Full Allotment.

The Administrator contends that he has discretionary authority to allot less than the full amounts authorized to be appropriated. The basis for this contention rests entirely on amendments that were agreed to by the House and Senate Conferees considering the bill. The phrase "not to exceed" was placed before the sums specified in Section 207 and the word "all" was deleted before the phrase "[s]ums authorized to be appropriated" in Section 205.[9] The Administrator's position is untenable.

The overriding intent of Congress was to commit the Federal government to a program assuring financial means to accomplish the tasks envisioned in the Act. The pertinent language of the Act and its legislative history, as outlined in Part

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[9] The two amendments in question were to Sections 205 and 207 of the Act, as shown below (bracketed material deleted, italicized material added):

ALLOTMENT

Section 205. (a) [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediate preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments. . . .

AUTHORIZATION

Sec. 207. There is authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, *not to exceed* $6,000,000,000 and for fiscal year ending June 30, 1975, *not to exceed* $7,000,000,000.

The "not to exceed" language was an amendment only to the House version of S.2770; the words already appeared in the comparable section of the Senate bill.

I of this *amicus* brief, clearly indicate that the Administrator must allot the *full* sums authorized to be appropriated by Section 207. Indeed, it is only by full allotment that there could *even be control over the* rate of spending at subsequent stages.

The Amendments relied on by the Administrator were sponsored by Congressman William H. Harsha of Ohio.[19] At the time the Act was being considered, Congressman Harsha was the ranking minority member of the House Public Works Committee, which reported on the House version of the Act. He was also the floor manager of the bill and a member of the conference committee. Congressman Harsha explained to the House the meaning of his amendments.

> . . . I want to point out that the limination of the word "all" before the word "sums" in Section 205 (a) and insertion of the phrase "not to exceed" in Section 207 was intended by the managers of the bill to *emphasize* the President's flexibility *to control the rate of spending.*

(Emphasis added.) 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972).

Significantly, Congressman Harsha was merely emphasizing what the Act already provided: namely, full allotment and deferred spending. At a later point of the debate, a colloquy between Congressmen Jones, Ford and Harsha revealed the intent of the amendments.

> **Mr. Gerald R. Ford.** Mr. Speaker. I think it is vitally important that the intent and purpose of Section 207 is spelled out in the legislative history here in the discussion of this conference report.

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[19] The District Court in *The City of New York v. Train, supra*, noted that the views of sponsors of the legislation at issue are of particular importance when reviewing its legislative history. 358 F.Supp. at 677.

As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in Section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly, that it is not a mandatory requirement that in one year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*

Mr. Harsha. I do not see how reasonable minds could come to any other conclusion that *the language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount . . . .

Mr. Gerald R. Ford. Mr. Speaker. I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio [Harsha].

Mr. Jones of Alabama. My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio [Harsha].

Mr. Gerald R. Ford. Mr. Speaker. This clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for *full obligation and expenditure* up to the authorization figure in each of the three fiscal years. . . .

(Emphasis added.) 118 Cong. Rec. H. 9123 (Daily ed. Oct. 4, 1972).

This history necessarily reflects the understanding of the Congress that there *must be* full allotment, for only by such full allotment could it be possible for subsequent expenditures to be made *up to* the authorization figure. From the above exchange it is clear that any discretion of the Administrator regarding the authorized funds was intended to be exercised only through the mechanism of *obligation and expenditure at later stages, and not through the allotment process.*

Congressman Harsha further noted that even in the exercise of discretion by the Administrator at a later point in time such discretion related *solely* to approval of plans, specifications and estimates.

> . . . I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.*

(Emphasis added.) 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972).[11]

Congressman Harsha explained the impact of the Act's funding provisions in terms of expenditures in future fiscal

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[11] Congressman Harsha reiterated his comments on the floor of the House after the President's veto. 118 Cong. Rec. H.10268 (Daily ed. Oct. 18, 1972). Congressman Harsha cited as support for the existence of flexibility the fact that impoundments by the executive branch of highway funds. 118 Cong. Rec. H.9122 (Daily ed. Oct. 4, 1972). The District Court in *The City of New York v. Ruckelshaus, supra*, 678 F.Supp. at 678, pointed out:

> . . . The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds allotted, i.e., *the controls were being exercised at the obligation level rather than at the allotment level.*

(Emphasis added.) Significantly, the very highway impoundments referred to by Congressman Harsha were declared to be illegal by the Court in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir., 1973).

years. In so doing, he demonstrated that it was his understanding that Sections 205 and 207 required *allotment of the full amount* of the sums specified in Section 207.

> [T]he first major impact of obligations from the $5 billion authorizations for the fiscal year ending June 30, 1973, is in fiscal year 1975 . . . .
>
> As a matter of fact, for fiscal year 1973 if *all the money were obligated and placed under contract, there would only be $20 million needed to meet the obligations.*

(Emphasis added.) 118 Cong. Rec. H. 10268 (Daily ed. Oct. 18, 1972).

Unquestionably, when Congressman Harsha spoke hypothetically of the *obligation* of the entire $5 billion, he necessarily expressed his recognition that the entire $5 billion had to be available by allotment for obligation. His statement was intended to *emphasize* to the House that the President's fear about "budget-wrecking" was unwarranted in view of the fact that there would be an inherent lag between the time when funds were *obligated* and the time when they would actually be *spent*.

Thus, the pacing of expenditures is built into the funding mechanism, but such pacing is itself dependent upon full allotment as an absolute prerequisite. Senator Muskie made the same point to the Senate when he noted that the full $18 billion authorized by the Act probably would not be spent until the end of fiscal year 1979.[12] Senator Muskie at the time was

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[12] Senator Muskie introduced into the record a table indicating the impact of the $18 billion on the budget. It was estimated that due to the extended period of time needed for construction that actual expenditure under full obligation would be the following percentages of the sums authorized to be appropriated: for the first year, 5 percent; the second year, 20 percent; the third year, 30 percent; the fourth year, 40 percent; and for the fifth year, 5 percent. 118 Cong. Rec. S. 18547 (Daily ed. Oct. 17, 1972).

Chairman of the Senate Subcommittee on Air and Water Pollution, which reported out the Senate version of the Act. He was a floor manager of the bill and a member of the conference committee. Senator Muskie, in a specific reference to the amendments proposed by Congressman Harsha, made it clear to the Senate that the meaning of the Act is as contended by the State of Minnesota and the City of New York herein.

> Under the amendments proposed by Congressman William Harsha and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated *need not be committed, though they must be allocated.* These two provisions were suggested to give the administration some *flexibility concerning the obligation of construction grant funds.*

(Emphasis added.) 118 Cong. Rec. S. 16871 (Daily ed. Oct. 4, 1972.[13]

Incredibly, the Administrator points to the legislative history and incredulously contends that Congressman Harsha, Senator Muskie and others, when explaining their understanding of the amendments, and in their use of such descriptive terms as "the obligation of construction grant funds," "the expenditure of funds," "controlling the rate of spending," and the "pacing item in the expenditure of funds," did not thereby intend to distinguish between the allotment stage, and the obligation and expenditure stages, of the statutory scheme. The Administrator's contention is based upon a palpable misconstruction of the Act's allotment provisions and constitutes a misrepresentation of the legislative history.

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[13] Senator Muskie reiterated his comments on the floor of the Senate after the President's veto. 118 Cong. Rec. S.18546, S.18549 (Daily ed. Oct. 17, 1972).

B. If the Administrator Has Any Discretion at the Allotment Stage, He Has Abused It.

1. Discretion was not exercised within the bounds delineated by the Act.

The Administrator's discretion involves solely approval or disapproval of projects based upon criteria set forth in the Act. The Administrator has abused this limited discretion by his refusal to allot over one half (55 percent) of funds authorized by Congress to construct publicly owned treatment works. The objectives of the Act, its goals, policies, effluent limitation deadlines, and enforcement provisions have been ignored by the Administrator. He has made no effort to justify his action other than by reference to the President's evaluation of competing national priorities, regardless of the declared intent of Congress as stated by law.

The Administrator may not arrogate such legislative power to himself. Congress alone enacts the law. Congress established bounds within which the Administrator is *required* to work in exercising any limited discretion he may have. These boun is are delineated by the clear language of the Act. The Administrator may not look beyond these bounds for supporting rationale to reduce the allotment of funds. If his decision had been based on the needs and problems of sewage treatment facilities construction, it might have been on more solid ground. However, a decision based on totally unrelated considerations is contrary to law. This principle was firmly established in a case analogous to those before the Court, i.e., *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1114 (8th Cir., 1973). The issue before the court in *Volpe* was whether the Secretary of Transportation may defer authority to obligate highway funds previously apportioned to the State or

Missouri under the Federal-Aid Highway Act of 1956 when the reasons given for deferment by the Secretary were the status of the economy and the need to control inflationary pressures. The funding scheme in the Highway Act is that principally adopted by Congress in the Act under consideration. The rationale of the *Volpe* case is irrefutable and should be recognized by this Court.

> To reason that there is implicit authority within the Act to defer approval [of projects] for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make. It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed *because of a system of priorities the Executive chooses to impose on all expenditures.* The Congressional intent is that the Secretary may exercise his discretion to insure that the roads are well constructed and safely built at the lowest possible cost, all in furtherance of the Act, but *when the impoundment of funds impedes the orderly progress of the federal highway program, this can hardly be said to be favorable to such a program.* In fact, it is in derogation of it. It is difficult to perceive that Congress intended such a result.

(Emphasis added.) 478 F.2d at 1114. See also *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973); *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C., 1973).

The rationale of *Volpe, supra*, bears forceful application to the present case. The Congressional intent as manifested in the Act here absolutely requires the Administrator to pro-

vide federal financial assistance for construction of publicly owned sewage treatment works. The Administrator was given discretion only to insure that the facilities are well designed and constructed for efficient operation and are capable of meeting the needs of the people in the areas to be served at the lowest possible cost. The Administrator's unlawful action here has the effect of disapproving numerous projects without proper review under the limitations and conditions of Section 204, thereby subverting the legislative objective.

Judge Miles Lord, in considering *State of Minnesota v. Fri, supra*, followed the rationale of *Volpe, supra*. He correctly noted:

> Nothing in the Act gives the Administrator the authority to consider matters outside the corners of the Act itself. In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the Act itself as well as in violation of the purposes of the Act as set forth by Congress. Furthermore, to the extent the Administrator has some discretion in this matter, the refusal to allot nearly half of the funds authorized *for reasons not related to the Act and its stated purposes* marks a clear abuse of such discretion.

(Emphasis added.) Slip Op. at 14.

The Administrator cannot be allowed to exercise discretion as though the Act did not exist. The Act alone must be the basis for any exercise of discretion by the Administrator.

2. The refusal to allot 55% of the funds authorized is a flagrant abuse of discretion because it effectively frustrates the intent of Congress as embodied in the Act.

The action of the Administrator drastically reduced the States capacity to carry out the purposes of the Act to fund the construction of sewage treatment facilities for the abatement of pollution of the waters of the State. The present Minnesota allotment is $121 million short of full allotment for the two fiscal years in question.[14] The Minnesota Pollution Control Agency, the agency administering the federal grant program, had pending 140 grant applications to upgrade or construct publicly owned treatment works for fiscal year 1973. These applications represented an estimated total construction cost of $212 million. If 75 percent federal funding were available, this would amount to $160 million. Consequently, the needs of Minnesota outstripped the Administrator's allotted amount for fiscal 1973 alone by a minimum of $119 million. Under the Administrator's allotment only 13 of the 140 applicants of the MPCA would be fully funded and one or two others stood to be partially funded. The total number of grant applicants for fiscal 1974 is approximately 200. This figure includes a carry-over of those projects from fiscal 1973 which were not funded. The Administrator's allotment allows funding of only five additional projects in fiscal 1974.[15]

Minnesota's case is not an isolated example. Its experience is duplicated in many, if not all States, with the result that thousands of plant construction projects have gone unfunded. Many more will go unfunded in the upcoming fiscal

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[14] Allotment Regulation, 37 Fed. Reg. 26282 (1972).

[15] These facts were presented by affidavits in *State of Minnesota v. Fri, supra*, and were not disputed by the Administrator.

years as the needs of the States go unmet. These monies will not be forthcoming unless allotted as required by law. The program initiated by the Act has effectively ground to a halt, frustrating the express intentions of the Congress.[16]

Furthermore, the intricate statutory scheme is so interrelated that the action of the Administrator has set off a domino-like chain reaction. Not only are projects halted now but municipalities are discouraged from proceeding with construction plans on their own. EPA regulations prohibit the awarding of any grant if initiation of the project construction has occurred, 38 Fed. Reg. 5330, §35.903(d) (1973). The inevitable result is that no eligible applicant or grantee will proceed with construction until the Administrator approves its project and thereby legally guarantees 75 percent federal funding. The Act holds out a generous "carrot" which no potential recipient can, as a practical matter, refuse. Consequently, no construction or upgrading of publicly owned treatment works in Minnesota and other States will be initiated until federal grants are made available for obligation by the Administrator.

The resulting total paralysis of the program is an intolerable situation for potential grantees. They are faced with statutory deadlines to meet specific effluent limitations. All publicly owned treatment works in existence on July 1, 1977, are required to have effluent limitations based on a minimum of secondary treatment. More stringent standards may be applicable to public treatment works by July 1, 1977, if necessary to meet water quality standards established pursuant to

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[16] This Court should not be misled by Table I, Petitioner's Brief, p. 49, showing that many States have not fully obligated the reduced allotments. Minnesota has numerous project applications pending approval by the Administrator. Indeed Table I more correctly indicates the grant program is floundering because of the Administrator's failure to make a full commitment of the funds.

State law or regulation. Section 301(b)(1)(B) and (C). This means that all publicly owned treatment works presently have less than three years to be in compliance with Federal and State laws and regulations. Construction of major projects can easily take three or four years. Those treatment works that fail to meet the effluent standards face a civil penalty of up to $10,000 per day of violation. Section 309(d). Any citizen adversely affected by a violation of an effluent standard may initiate legal action. The remedies available by a citizen suit could include appropriate civil penalties under Section 309(d) of the Act. Section 505(a)(1) and (2). As a result, without the allotment of the impounded funds, many communities, particularly smaller ones, will simply be unable to comply with the effluent standards and will thereby be subject to enormous penalties.

Congress could not have intended for its purposes to be so effectively emasculated by the action of one official at one stage of the statutory scheme. The Administrator suggests that he has the authority and will eventually allot the full amount of the authorized funds, and thus there is no adverse effect on the States. This assumes that there is legal merit to the Administrator's interpretation of Sections 205 and 207, an interpretation which must be rejected as a spurious afterthought.

When Sections 205 and 207 are analyzed in the context of the whole Act and its legislative history, the inevitable conclusion is that the Administrator must allot the full sums authorized by Congress. It is inconceivable that Congress intended to grant the Administrator unfettered discretion at the allotment stage and thereby make the Act a series of empty promises.

Failure to allot over half of the sums authorized for fiscal year 1973 and 1974 was a clear abuse of discretion.

3. The President and the Administrator cannot do indirectly what the President was forbidden by Congress to do by veto.

When the Act was first passed by Congress the President exercised his veto power over it. At that time he understood that Congress intended the full allotment of funds. In his veto message he stated:

> Certain provisions of . . . [the] bill confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive.

(Emphasis added.) 118 Cong. Rec. H. 10266 (Daily ed. October 18, 1972).

The President recognized that the Act *required* the use of the funds for the purposes appropriated and vetoed it for that reason. Congress overrode this veto, reaffirming its strong commitment to the program.

It is significant that the President, in *vetoing* the bill, actually assumed an interpretation of the Act contrary to that subsequently taken in impounding the funds. The President initially assumed the existence of discretion only at the *spending* level. However, after the veto was overridden the President assumed the right to impound at the earlier stage of *al-*

lotment. The fact that the President originally interpreted the Act in the same manner as that contended by the Respondents constitutes a compelling argument against the subsequent contrary interpretation taken by the President through the Administrator. Presumably, the President concluded that he would be under pressure to spend more than he desired unless he impounded at the allotment stage. The President and the Administrator cannot do indirectly what the President originally recognized he could not do directly.

Where the Executive Branch is mandated by Congress to expend funds for a well-defined program containing specific time tables set up to reach the desired goal, it is the *duty* of the Executive to execute that law. The Executive may not decline to execute it.

The position of the State of Minnesota is further supported with compelling effect by a memorandum authored by Justice William Rehnquist when he was serving as an Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. The memorandum was addressed to the Deputy Counsel to the President and concerned the President's authority to impound funds appropriated for aid to federally impacted schools. It reads in part as follows:

> With respect to the suggestion that the President has a *constitutional power to decline to spend* appropriated funds, *we must conclude that existence of such a broad power is supported by neither reason nor precedent.* There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. See 42 Ops. A.G. No. 32, p. 4 (1967). *But this is basically a rule of construction,* and does not meet the question whether the President *has authority to refuse to spend where*

> the appropriation act or *the substantive legislation, fairly construed, require such action.*
>
> . . . .
>
> It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and *it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.*

(Emphasis added.) The Rehnquist memorandum is reprinted at 119 Cong. Rec. S. 3808 (Daily ed. March 1, 1973).

The principle that an administrative official may be compelled to expend money mandated to be spent was established long ago in *Kendall v. United States*, 12 Pet. 524 (1838), where it was held that mandamus law to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. Here the Executive Branch should thus be compelled to act within the bounds defined by the law by allotting the monies needed to implement the comprehensive program to attain clean water.

III. THE ACTION OF THE ADMINISTRATOR IS NOT SO "COMMITTED TO AGENCY DISCRETION" AS TO BE NONREVIEWABLE.

The Administrator contends that his refusal to allot 55% is nonreviewable because it comes within the admittedly "very narrow" exception of the Administrative Procedure Act, 5 U.S.C. §701 (Supp. V) making actions "committed to agency discretion by law" not subject to review. This contention has no merit, for the exception is limited to cases where the statute is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). In this case there is abundant statutory language governing the bounds of the Administrator's actions. Once these limits are exceeded the action is reviewable. It is clearly the business of the judicial branch to determine the limits of statutory grants of authority. Justice Reed in *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944), placed the issue in proper perspective.

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. *United States v. Morgan*, 307 U.S. 183, 190-91.

> This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by exertion of unauthorized administrative power.

In determining whether the Administrator's action is inconsistent with the Act, this Court should follow the basic canon of construction observed in *Richards v. United States:*

> We believe it fundamental that a section of statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpretating legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

369 U.S. 1, 11-12 (1962).

The provisions of the Act provide the appropriate standards. A court by analysis of the Act can easily determine that the latitude of the questioned discretion is not as broad as the Administrator mistakenly asserts. The standards for review are found in the purposes and policies of the Act, its objec-

tives and goals, its project review provisions, its time limits and its effluent limitations. As Judge Russel stated in *Campaign Clean Water v. Train*, 489 F.2d 492, 498 (1973).

> [T]he executive . . . has the constitutional duty to execute the law in accordance with the legislative purpose so expressed. When the executive exercises its responsibility under appropriate legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review.

The Act does not confer upon the Administrator or his agency the discretion to deny allotment of funds using any other standards but those provided in the Act. The Administrator is asking the Court to recognize discretion that totally disregards the Act and thereby negates the existence of *any* law applicable to him. The Administrator's contention is untenable.

CONCLUSION

The State of Minnesota respectfully requests that the Court hold that the Administrator is mandated by the Act to allot to the States the full amount of sums authorized by Congress for the construction of publicly owned sewage treatment facilities. In the alternative, the Court should hold that the action of the Administrator constituted an abuse of discretion.

Respectfully submitted,

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